(2)

No. 04-148

Supreme Court, U.S.
FILED
AUG 27 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

TOM R. PABST,

Petitioner,

v.

CITY OF FLINT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

BRIAN A. KREUCHER
KELLER THOMA, P.C.
440 E. Congress, 5th Floor
Detroit, MI 48226
(313) 965-7610
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORPORATE DISCLOSURE STATEMENT

The Respondent, City of Flint, is not a subsidiary or affiliate of a publicly owned corporation. There is no parent or publicly held company that owns more than 10% of the corporation's stock.

TABLE OF CONTENTS

	Page
Corporate Disclosure Statement	i
Table of Contents	ii
Opposition to Petition for Writ of Certiorari	1
Statement of the Case	1
Misstatements Made in the Petition	1
Reasons Why the Petition Should Be Denied On the Basis of Misstatements Made Therein	2
Conclusion	7

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This case does not warrant review by the Supreme Court. The decision below rests upon its own facts and, as described by the United States Court of Appeals for the Sixth Circuit, "has minimal precedential value." (App. 2). The petition for writ of certiorari is so meritless that the Court will not need the assistance of a brief in opposition. Respondent submits this Brief for the sole purpose of pointing out misstatements made in the petition, as required by Rule 15.

STATEMENT OF THE CASE

A satisfactory summary of the facts relevant to the consideration of the questions for review presented in the petition is set forth in the opinion and order of the United States Court of Appeals for the Sixth Circuit, which is incorporated by reference herein. (App. 1-23).

MISSTATEMENTS MADE IN THE PETITION

The petition purports to present three questions for review, two of which are premised upon misstatements of fact. Specifically, the following questions for review made in the petition contain misstatements of fact:

> Question 2. Is the use of an unsealed document which was already part of a state court public record in a state court proceeding protected by the United States Constitution, including specifically the First Amendment, from a federal district court's injunction/restraint upon the use of said

> document by the device of criminal sanctions against a state court attorney? (Petition, p. 15).

Contrary to Question 2 as presented in the petition, the document at issue, the Rose deposition transcript, was not an "unsealed" document.

> Question 3. Can a federal circuit court create subject matter jurisdiction where none exists by making a conclusive finding of fact directly opposite of the finding of the district court without showing clear error pursuant to the proper appellate standard? (Petition, p. 15).

Contrary to Question 3 as presented in the petition, the United States Court of Appeals for the Sixth Circuit did not make a finding of fact "directly opposite" to a finding of fact made by the United States District Court for the Eastern District of Michigan.

REASONS WHY THE PETITION SHOULD BE DENIED ON THE BASIS OF MISSTATEMENTS MADE THEREIN

1. **Contrary to Question 2 presented in the petition, Pabst did not make use of "an unsealed document which was already part of a state court public record in a state court proceeding." The document used by Pabst in violation of the Injunction of the district court, namely, the Rose deposition transcript, was a sealed document.**

Significantly, the Rose deposition transcript was made part of the state court public record by none other than Pabst himself. After the district court issued its December 18, 2000 Injunction striking the Rose deposition transcript

and prohibiting its use, Pabst attached copies of the Rose deposition transcript as exhibits to two motions he filed on behalf of different clients in separate legal actions pending in the Genesee County Circuit Court. In both legal actions, counsel for the Respondent immediately moved to strike and seal the Rose deposition transcript filed by Pabst. Both Genesee County Circuit Court Judges ordered that the Rose deposition transcript be sealed. (App. 45-48).

Previously, on September 11, 2000, while the Respondent's Motion for Protective Order seeking to strike the Rose deposition transcript in the *Banner* action was pending before the district court, Pabst attached a copy of the Rose deposition transcript to a document he filed in the Genesee County Circuit Court on behalf of a client. Although Pabst claims that this action was purely innocent on his part, he knew, at the time that he did so, that the Respondent's Motion for Protective Order was pending before the district court in the *Banner* action, because it was the plaintiff's attorney in the *Banner* action who provided Pabst with a copy of the Rose deposition transcript. (App. 5).

While Pabst apparently deems it notable that this particular copy of the Rose deposition transcript was never sealed, the fact that the same Genesee County Circuit Court Judge to whom it was submitted later ordered another copy of the Rose deposition transcript (also filed by Pabst) to be sealed undermines any contention that Pabst was making use of "an unsealed document," or that he was somehow justified in continuing to use the Rose deposition transcript even after the district court issued its December 18, 2000 Injunction. Such a contention is even further undermined by the fact that Pabst

subsequently filed a motion requesting the Genesee County Circuit Court to "unseal" the Rose deposition transcript. (App. 52).

2. Contary to Question 3 in the petition, the court of appeals did not make "a conclusive finding of fact directly opposite of the finding of the district court" and, accordingly, this Court need not decide whether the court of appeals did so upon a showing of clear error.

In its February 23, 2001 Order Holding Tom Pabst in Contempt, the district court carefully explained that two portions of its December 18, 2000 Injunction that applied specifically to Pabst were enforceable against him: (1) the portion enjoining him from using the Rose deposition in any other proceeding, and (2) the portion "barring him from sharing the Rose deposition with any attorneys whom he knows will use the deposition in other legal proceedings." (App. 41). Since these prohibitions in the Injunction applied specifically to Pabst, the district court sanctioned him for disregarding them.

The district court further explained that the remaining portions of the December 18, 2000 Injunction, which applied solely to the Plaintiff's counsel in *Banner*, could be enforced against Pabst only if he was acting "in active concert or participation" with the Plaintiff's counsel. (App. 42). This, the district court found, was not the case. Specifically, the district court stated:

> . . . [T]he Court will not extend its injunction to preclude Pabst from deposing or cross-examining Rose on any matters that were the subject of her March 7, 2000 deposition. In this Court's December 18, 2000 Order, Plaintiff's counsel was enjoined

> from disclosing the contents of the deposition to anyone else and from deposing or cross-examining Rose on the subject matter of her March 7, 2000 deposition. However, that portion of the injunction was not extended to "any attorney."
>
> In order for this Court to hold Pabst bound by the portions of the Order specifically pertaining to Plaintiff's counsel, he would have [to] be "in active concert or participation with" them. Rule 65(d). "The 'active concert or participation' clause is designed to prevent . . . , the addressee of an injunction, eager to avoid its obligations, persuad[ing] a friendly third party to take steps that frustrate the injunction's effectiveness."
>
> In this case, Pabst's questioning of Rose on the subject matter of her earlier deposition would not aid Plaintiff's counsel in any effort to avoid their legal obligations under the injunction. Furthermore, the evidence in this case reveals that Freifeld gave Pabst a copy of the Rose deposition before this Court's injunction: As a result, his giving Pabst a copy of the deposition cannot be viewed as an effort to thwart his legal obligation under the injunction. There is no evidence that Pabst has or is acting in active concert or participation with Plaintiff's counsel, and, therefore, he is not bound by the portions of this Court's Order specifically pertaining to Plaintiffs' counsel. (App. 41-42) (citations omitted).

The district court's ruling that Pabst was not "acting in active concert or participation" with the Plaintiff's counsel in *Banner* clearly was limited solely to that portion of the Injunction which prohibited the Plaintiff's counsel in *Banner* from deposing or cross-examining Rose regarding the subject matter of her March 7, 2000 deposition. (App.

42). Accordingly, the district court held that Pabst was not bound to that portion of the Injunction.

In the opinion issued below, the court of appeals affirmed that the two portions of the district court's Injunction that applied specifically to Pabst were enforceable against him:

> We hold that forbidding the use of the Rose deposition in the *Banner* case and forbidding its use by Pabst in other cases were both appropriate exercises of the district court's authority. We reach this conclusion because we find that Pabst was both in active concert and participation with Freifeld and the Law Firm, and had adequate notice of the details of the injunction to place him on notice of his obligations thereunder. (App. 18).

In the petition, Pabst contends that by finding that Pabst was "in active concert and participation with Freifeld and the Law Firm," the court of appeals made a finding that is contrary to the finding made by the district court. (Petition pp. 11-13). This is simply untrue. The court of appeals merely affirmed the district court's ruling that Pabst was bound by the portions of the Injunction which applied specifically to him and of which he had adequate notice. The court of appeals did not make a finding that Pabst was in active concert and participation with the Plaintiff's attorneys in *Banner* with respect to his examination of Rose regarding the subject matter of her previous deposition, and the court of appeals did not rule that Pabst was bound to that portion of the Injunction.

Accordingly, the court of appeals did not make any finding "directly opposite" to a finding made by the district court, and no showing of clear error was required.

CONCLUSION

On the basis of the misstatements made in the petition for writ of certiorari, the petition should be denied.

Respectfully submitted,

BRIAN A. KREUCHER
KELLER THOMA, P.C.
440 E. Congress, 5th Floor
Detroit, MI 48226
(313) 965-7610
Counsel for Respondent

99 Fed.Appx. 29

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

United States Court of Appeals, Sixth Circuit.

Elizabeth BANNER, Plaintiff, Michael Freifeld and Law Office of Glen N. Lenhoff, Appellants, Tom R. Pabst, Appellant.

v.

City of Flint and Carl Hamilton, Defendants-Appellees.

Nos. 01-1118, 01-1401 and 02-1297.

April 8, 2004.

On Appeal from the United States District Court for the Eastern District of Michigan.

E. Michael Morris, Morris & Doherty, Birmingham, MI, Michael A. Kowalko, Flint, MI, for Appellants.

Tom R. Pabst, Flint, MI, pro se.

Terrence J. Miglio, Brian A. Kreucher, Barbara Endoy, Keller, Thoma, Detroit, MI, H. William Reising, Plunkett & Cooney, Flint, MI, Ernest R. Bazzana, Plunkett & Cooney, Detroit, MI, for Defendants-Appellees.

Before: MARTIN and DAUGHTREY, Circuit Judges, and O'MALLEY, District Judge.*

PER CURIAM.

These consolidated appeals challenge three orders entered by the district court imposing sanctions against attorney Michael Freifeld, his law firm, and attorney

---

* Honorable Kathleen M. O'Malley, United States District Judge for the Northern District of Ohio, sitting by designation.

Thomas Pabst. The underlying case was settled and dismissed by stipulation of the parties.

The factual circumstances in this case are complex and unlikely to be repeated. At the same time, Messrs. Freifeld and Pabst raise a great number of issues, stemming in part from the complicated nature of the relevant facts. A full discussion of the facts, and a complete analysis of the issues raised, would require a lengthy opinion. This case, however, has minimal precedential value. For these reasons, we have set forth below only an abbreviated discussion of the factual history and the many arguments raised, even though our analysis has been painstaking. Ultimately, we conclude as follows.

With regard to the district court's sanction order against attorney Freifeld and his law firm: (1) the district court was within its rights to conduct an evidentiary hearing regarding Freifeld's behavior; (2) the district court properly used a de novo review of the Magistrate Judge's ruling; (3) the district court concluded correctly that Freifeld did breach Michigan Rule of Professional Conduct 1.6; (4) the district court had the authority to impose sanctions for this breach; (5) Freifeld and his law firm received adequate notice before the district court imposed sanctions; (6) neither the sanction of $15,000 in attorney fees payable to defendant Flint, nor the sanction of $5,000 in attorney fees payable to defendant Rose, were unreasonable, and both sanctions were within the district court's power and discretion; (7) the district court had the power and authority to impose a $5,000 sanction in the form of a fine payable to the court; (8) the district court followed the proper procedure regarding imposition of the $5,000 sanction, given that the sanction was not in connection with a finding of contempt; (9) nonetheless, the sanction of

$5,000 payable to the clerk of court was unreasonable and an abuse of discretion in the circumstances, because the $20,000 attorney fee sanctions alone adequately served the necessary punitive and deterrent purposes. Accordingly, we **AFFIRM** the sanction against Freifeld and his law firm of $15,000 in attorney fees payable to defendant Flint, and **AFFIRM** the sanction against Freifeld and his law firm of $5,000 in attorney fees payable to defendant Rose, but we **REVERSE** the sanction against Freifeld of $5,000 payable to the clerk of court.

With regard to the sanctions against attorney Pabst: (1) the Anti-Injunction Act is inapposite to the question of the court's authority to sanction Pabst's conduct; (2) the propriety of the district court's injunction is controlled by Fed.R.Civ.P. 65; (3) the district court's injunction was arguably overbroad, to the extent it forbade use of the Rose deposition in *any* case by *any* attorney, but it was not overbroad as to attorney Pabst, who was acting "in active concert or participation" with Freifeld; (4) despite this possible overbreadth, Pabst's willful defiance of the district court's injunction order was completely inappropriate; (5) the district court was correct in its conclusion that Pabst disobeyed a district court order, he did so deliberately, and he did so beyond a reasonable doubt (*see In re Smothers,* 322 F.3d 438, 441-42 (6th Cir.2003)); (6) the $1,000 and $2,000 fines payable to the clerk of court, although reasonable in amount, were criminal in nature; (7) as such, the district court had to comply with the notice provisions of Fed.R.Crim.P. 42(b); (8) as to the first contempt fine of $1,000, the district court did not comply with Rule 42(b), because it did not give Pabst adequate notice that he might be subject to criminal sanctions; (9) as to the second contempt fine of $2,000, Pabst did

receive adequate notice; and (10) the trial judge did not err when she declined to recuse herself. Accordingly, we **AFFIRM** the $2,000 sanction against Pabst, payable to the Clerk of Court, but we **REVERSE** the $1,000 sanction against Pabst, payable to the Clerk of Court, and REMAND this case with directions that the district court may address again the propriety of the first sanction against Pabst.

Finally, we **DENY** the motion by Flint and Rose for sanctions against Pabst on appeal.

I. BACKGROUND

Michael Freifeld, an associate in the Law Office of Glen N. Lenhoff (the Law Firm) represented Elizabeth Banner in a race discrimination case against Flint. In early 2000, another Flint employee, Vickie Rose, met Freifeld separately to discuss a potential employment-related claim against Flint. During Rose's meeting with Freifeld, she shared confidential information about her job. During the consultation, Freifeld told Rose that he represented Banner and that he might wish to call Rose as a witness. He asked Rose to sign an affidavit in support of Banner's claims, but she refused. Ultimately, Rose decided not to retain Freifeld and not to sue Flint, opting instead to avoid disruption of her job.

Freifeld later noticed Rose's deposition in the Banner case as an employee-witness, and Flint, not being aware of Freifeld's earlier conversations with Rose, instructed Rose to appear. On March 7, 2000, Rose was deposed by Freifeld without the benefit of personal counsel. Freifeld proceeded to question Rose about the matters discussed during their initial attorney-client consultation. While Rose responded

to the questions put to her, Rose later testified that she did not appear at the deposition voluntarily, but was required to do so by her job, and that she did not voluntarily provide information in order to assist Banner's case against Flint. Rose also said she did not think Freifeld would ask about the confidential matters they discussed, and that Freifeld never told her that she had the right to assert an attorney-client privilege or any other right to confidentiality with respect to her earlier discussions with him.

After Freifeld deposed Rose, he gave a copy of the transcript to Pabst, a lawyer who was not associated with the Law Firm, but was involved in other cases against Flint. Pabst deposed Rose in May in connection with a state-court employment action against Flint and asked about the confidential information she had provided to Freifeld.

In June, facilitators in *Banner* recommended a settlement of $170,000. The parties did not initially agree to this settlement. On June 27, Flint and Rose moved for an order: 1) striking Rose's deposition testimony; 2) preventing her deposition testimony from being used in *any* legal or administrative proceeding; 3) barring Banner's attorneys from inquiring into areas in which Rose could assert her attorney-client privilege; and 4) imposing sanctions. In opposition, Banner argued that Rose waived her attorney-client privilege by voluntarily appearing at the deposition and answering questions without objection. Freifeld and the Law Firm argued that they committed no ethical violations. A magistrate judge held a hearing and issued an order denying the motion to strike on grounds that, even if she did not understand the concept of attorney-client privilege, Rose had, nonetheless, waived her privilege vis-a-vis Freifeld by answering questions at the

deposition without a contemporaneous objection. Flint and Rose filed objections in district court, seeking an order granting their motions or a hearing.

In October, the parties reached an agreement to settle the Banner case for $130,000. On October 10, Lenhoff, Freifeld, and attorneys for Flint were to meet with the district judge for a pretrial conference in another case. The parties told her the *Banner* case had settled. She asked about the objections to the magistrate judge's order and said she was concerned about the deposition. Though Freifeld and the Law Firm argued that those matters had been mooted by the settlement, the judge told Freifeld and Lenhoff that she was referring the matter to the Michigan Attorney Grievance Committee and ordered them to appear, along with Rose, for *in camera* review of all records about Rose.[1]

The court held an evidentiary hearing on November 3, 2000. The court explained that the hearing was necessary because of her concern that certain ethical violations had occurred in a matter pending before her; the court found that the settlement did not moot those concerns. The parties not only addressed the issues presented to the magistrate judge, but, at the request of the district judge, also addressed Michigan Rule of Professional Conduct 1.6, covering confidentiality. The parties had earlier briefed Michigan Rule of Professional Conduct 1.9, regarding the attorney-client privilege and its application to former

---

[1] It does not appear that either Flint or Rose sought to keep the matter alive post-settlement; all parties appear to have been surprised by the district court's unwillingness to ignore this seemingly collateral issue.

clients, but had not addressed a lawyer's general obligation to maintain client confidences.

The district court found that Freifeld and the Law Firm breached both the attorney-client privilege and the obligation of confidentiality imposed by Rule 1.6 in taking the Rose deposition. The court set aside as clearly erroneous the magistrate judge's order denying the motion to strike the deposition. The court stated that Freifeld showed "a disregard for the rules of professional conduct" and found he and his law firm misinterpreted another ethics rule not at issue here.[2]

The court remarked that Freifeld "display[ed] a reckless attitude toward the rules of professional conduct" in pressuring Rose to disclose confidential information and that he showed a lack of concern for whether her disclosures would be detrimental once revealed. This violated "the spirit, if not the letter," of the Michigan Rules, according to the district court. The court struck Rose's deposition; enjoined *Banner's attorneys* from distributing it or disclosing its contents; and prohibited them from deposing Rose about matters in it. The court also enjoined use of the deposition in *any other proceeding by any attorney.* Finally, the court imposed a $5,000 sanction payable to the court against Freifeld, and ordered Freifeld and the Firm to pay Flint's attorney $15,000 in fees (relating to the Rose deposition, the motion for a protective order and the

[2] Both the magistrate judge and district court found that Freifeld and his firm had engaged in improper *ex parte* contact with Flint's former employees in violation of Michigan Rule of Professional Conduct 4.2 and barred further such contact, though no sanction was imposed in connection with that conduct. The parties have not appealed that aspect of the lower court's ruling.

hearing) and to pay Rose's attorney $5,000 for fees (in connection with her request for a protective order and attendance at the hearing). Lastly, the district court stated it would refer Freifeld and the Law Firm to the state Attorney Grievance Commission.

After the district court prohibited the deposition's use, an attorney for Flint sent a letter to Pabst with a copy of the order, telling Pabst that the court had barred him from using the deposition in state court. Pabst disagreed, asserting that he did not believe the order could bind him in state court and stating that he would ask the state court to conduct its own hearing. Pabst made several filings in state cases, attaching complete transcripts of the deposition to two motions, stating he was challenging the injunction. Pabst did not seek relief from the federal court order before the district court, however, and he did not seek to appeal that order to this Court. Indeed, Pabst concedes that he knowingly violated the district court order based on his own determination that the order was invalid. Attorneys for Flint and Rose filed a motion in the district court to hold Pabst in contempt. In his answer, Pabst made many arguments, including his assertion that the district judge should disqualify herself because she had displayed hostility toward Banner's attorneys by sanctioning them, that the injunction did not comply with Federal Rule of Civil Procedure 65(d), that Pabst was not among the parties or agents involved in *Banner* or in active concert or participation with them, and that the order could not apply to his actions in state court.

The district judge denied the motion to disqualify herself. The court then found that Pabst was bound by her order and held Pabst in contempt, imposing a sanction of $1,000 payable to the court. Despite this order,

Pabst continued to ignore the injunction. Again, Pabst did not seek and await an order setting aside the injunction; he, instead, continued to ignore the injunction order based on his own disagreement with the trial judge's authority to enter it. In September 2001, Pabst filed an answer to Flint's motions in state court and renewed a request for an evidentiary hearing, again attaching the deposition transcript. Flint again sought sanctions against Pabst. On January 23, 2002, the district court held yet another hearing and imposed an additional fine of $2,000 on Pabst, payable to the Clerk of Court, for contempt. Pabst finally filed a motion to modify the injunction with the district court on April 22, 2002. That motion was denied. While Pabst did not appeal the district court's Spring, 2002 order, he did timely appeal the two sanctions orders entered in February, 2001 and January, 2002, respectively. Both of Pabst's appeals have been consolidated with the appeals taken by Freifeld and the Law Firm.

II. ANALYSIS

A. Freifeld's Appeal

Freifeld's multiple assertions fall into three categories. First, the district court did not have authority to reverse the magistrate judge and used the wrong standard of review in doing so. Second, the court's analysis of attorney-client privilege was wrong with respect to waiver, as was its analysis of the Michigan Rules of Professional Conduct. Third, the district court abused its discretion in imposing sanctions. We disagree with all of these assertions, save a portion of the third.

The Magistrate Judge's Decision

Pursuant to the Federal Magistrate Judge's Act, 28 U.S.C. § 636, a district court may designate a magistrate judge to decide any nondispositive pretrial matter. *Id.* § 636(b)(1)(A). A district court may reconsider a magistrate judge's decision on matters so designated and overturn it only if it is "clearly erroneous or contrary to law." *Id.* Freifeld and the Law Firm rely on our decision in *United States v. Curtis,* 237 F.3d 598 (6th Cir.2001), to argue that the trial court applied the wrong standard and used a *de novo* review. We remanded in *Curtis,* though, not because the district court applied the wrong standard, but because we could not tell what standard it used. *Id.* at 603-04. Here, it is obvious from the district court's opinion that she felt that the magistrate judge's decision was clearly erroneous for a number of reasons, not the least of which was the magistrate judge's failure to consider certain ethical standards the district court found controlling. Specifically, the district court concluded that the magistrate judge's failure to consider Freifeld's duty of confidentiality rendered the underlying order "contrary to law."

The district court was correct to conduct an evidentiary hearing, moreover, despite Freifeld's objections to one. In *Conetta v. National Hair Care Centers, Inc.,* 236 F.3d 67 (1st Cir.2001), the First Circuit wrote that, although the Federal Magistrate's Act does not expressly allow the district court to take new evidence in nondispositive matters referred to a magistrate judge, "it is not clearly forbidden either if there is good cause for revisiting the matter." *Id.* at 74. The court iterated that the case belongs to the district judge and that the Federal Magistrate's Act is designed to ensure that parties may have a pretrial ruling reconsidered where the ruling is

based on error or mistake of law, and *not* to limit the power of the district judge. *Id.* Here, the court considered evidence submitted to the magistrate judge, and determined that the ethical issues needed further inquiry.

We agree that the magistrate judge did not consider Rule 1.6, so the district court was entitled to take evidence and decide on the application of that rule. Inherent power stems from the concept that courts have powers necessary to exercise their other powers. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 35, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). "[C]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates. . . . " *Anderson v. Dunn*, 6 Wheat. 204, 227, 5 L.Ed. 242 (1821). With regard to Rule 1.6, the district court invoked its powers to consider issues the magistrate judge had not. We find, moreover, that, once invoked, the district court correctly assessed that disciplinary rule and had the right to control attorney conduct before her by sanctioning violations of it.[3]

Ethical Considerations

When a potential client consults with an attorney, the consultation establishes a relationship akin to that of an attorney and existing client, and the elements of the

[3] While we tend to agree with the district court that the magistrate judge's interpretation of the attorney client privilege and attendant principles of waiver was also clearly erroneous in the circumstances presented here, we need not reach that issue because we find the district court's consideration of Rule 1.6 to have been both within the scope of her authority and, ultimately, correct.

attorney-client privilege we set forth in *Reed v. Baxter,* 134 F.3d 351, 355-56 (6th Cir.1998), are satisfied:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure by himself or the legal adviser, (8) unless the protection is waived.

To encourage candor in the attorney-client relationship, the lawyer must maintain confidentiality of information relating to the representation. *See* Michigan Rules of Professional Conduct 1.6, cmt. The ethical rule of confidentiality is closely related to the evidentiary rule of attorney-client privilege. Hazard, Geoffrey C., Jr., and Hodes, W. William, 1 The Law of Lawyering § 9.7 (3d. ed.2001). The difference is that confidentiality "applies to virtually all information coming into a lawyer's hands concerning a client, and forbids virtually all disclosures. . . . " *Id.* The privilege is narrow in scope, invoked in response to an attempt to compel testimony, where the testimony sought is about information passed between lawyer and client. *Id.* The duty of confidentiality "directs lawyers not to disclose – voluntarily or otherwise, unless an exception applies, information that the lawyer has learned *about* a client, no matter where or how the information was learned." *Id.* Thus, if Rose's information was protected by attorney-client privilege, and Rose waived the privilege, its disclosure by Freifeld would still be subject to his duty of confidentiality.

Flint and Rose cite several cases to support the proposition that Freifeld breached ethical duties when deposing Rose. *See, e.g., United States v. Moscony,* 927 F.2d

742, 750 (3d Cir.1991) (holding a conflict of interest arose when attorney loyalties were divided, and loyalties were divided when an attorney cross-examined former clients). Michigan Rule 1.6 allows disclosure of confidences and secrets with consent of the client "but only after full disclosure." Full disclosure is advising the client about the advantages *and disadvantages* of revelation in language the client can understand. Hazard at § 9.16. We cannot find where Freifeld gave full disclosure before laying bare Rose's confidences. Thus, we find that substantial evidence supports the district court's finding that Freifeld violated Rule 1.6.

Sanctions Against Freifeld and the Law Firm

The district court did not state under what authority it was imposing sanctions, though the court did clearly differentiate between its award of attorneys fees against Freifeld and the Law Firm and the imposition of a fine on Freifeld individually. Courts need specific statutory authority, the presence of bad faith, or the willful disobedience of a court order before they award attorneys' fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 260, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). We stated in *Tiedel v. Northwestern Michigan College,* 865 F.2d 88, 93-94 (6th Cir.1988), that, absent Congressional authorization, federal courts may exercise inherent powers to award attorneys' fees in "narrowly defined circumstances." When an attorney or litigant has demonstrated bad faith in the conduct of litigation, the court has the inherent authority to assess an award of attorneys' fees. *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 765-66, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). Imposition of sanctions comes from the court's power to police itself, so that

a court can vindicate its authority without resorting to a finding of contempt of court. *Chambers,* 501 U.S. at 46. If the district court uses its inherent powers to sanction, it must find that the questioned conduct constitutes or is tantamount to bad faith. *Id.* at 767. As we noted in *Scharer v. Plabell Rubber Products, Inc.,* 858 F.2d 317, 320 (6th Cir.1988). attorneys' fees have been awarded under inherent authority "in the interest of justice" with no finding of bad faith. *Id.*

In *First Bank of Marietta v. Hartford Underwriters Insurance Company,* 307 F.3d 501, 513 (6th Cir.2002), we discussed *Mann v. University of Cincinnati,* Nos. 95-3195, 95-3292, 1997 WL 280188 (6th Cir. May 27, 1997), in which we held that the conduct the district court found "tantamount" to bad faith was indeed bad faith, despite no express language in the district court's opinion. *Id.* Clearly, a district court has within its power the authority to consider ethical breaches occurring in the context of litigation under its auspices and to impose sanctions for such breaches. No magic words are necessary to support the imposition of sanctions where the record is sufficiently detailed and the evidence in that record supports the conclusion that sanctionable conduct, in fact, occurred.

A court must give notice and afford an attorney opportunity to be heard before imposing sanctions. *Wilson-Simmons,* 207 F.3d at 822. The district court must give parties facing sanctions minimal procedural protections, but not formal notice detailing the penalties or a full evidentiary hearing. *Id.* A full evidentiary hearing is not needed when the court has sufficient relevant information, including pleadings or materials filed in the record, to decide. *Id.* at 823. Here, Freifeld and the Law Firm had ample notice that the district court was considering

sanctions. On October 12, 2000, the district court ordered Rose and Freifeld to appear at a November 3, 2000 evidentiary hearing on Flint's and Rose's objections to the magistrate judge's order regarding the motion to strike, and also ordered Freifeld to produce for *in camera* review all notes and records regarding Rose. Even ignoring the notice Freifeld received by virtue of the motion to strike and evidentiary hearing in front of the magistrate judge, the district court certainly provided Freifeld with sufficient notice that it was going to hold its own hearing to consider the propriety of sanctions; the district court even telegraphed the depth of its concern with Freifeld's actions when it set the hearing date. Thereafter, the court held a fairly detailed hearing, making a full record of the proceeding and of its findings. Ultimately, we are satisfied that Freifeld and the Law Firm were afforded adequate notice and access to substantial judicial processes before sanctions were imposed upon them.

The final question is the reasonableness of the sanctions imposed. As to the attorneys' fees awarded to Flint and Rose, we find that the record supports the conclusion that the fees and costs incurred by virtue of the ethical breaches upon which the sanctions were based reasonably approximate the sums imposed by the district court. Accordingly, we find that the district judge acted within her discretion, and acted reasonably, in awarding $15,000 and $5,000 in attorney fees to Flint and Rose, respectively.[4]

---

[4] Indeed, the court was quite temperate in her consideration of these serious matters.

We find, however, that the additional $5,000 against Freifeld, payable to the Clerk of Court, was not reasonable in the face of the substantial fee awards otherwise imposed. In the past, this Court has expressed concern over payment of a fine into the court under Rule 11 where the procedural protections otherwise applicable to a criminal contempt finding are not strictly employed. *Scharer,* 858 F.2d at 321. We recently held, however, that a small fine payable to the court is acceptable in certain circumstances, even when summarily imposed. *In re Smothers,* 322 F.3d 438, 443 (6th Cir.2003). While we decline to draw a line demarcating where a fine ceases to be sufficiently small to fall within the bounds of *Smothers,* we are troubled by the size of the fine imposed upon Freifeld in this case. The district court did not provide any rationale for the fact or amount of the "additional sanction" she imposed upon Freifeld. We find that, in light of both the attorneys' fee awards imposed and the procedural status of the case (the sanctions were imposed post-settlement), the additional $5,000 was not reasonably related to the punitive and deterrent purposes of the sanctions.

Ultimately, we **AFFIRM** the district court's award of a total of $20,000 in attorneys' fees to Flint and Rose, payable by Freifeld and the Law Firm, but **VACATE** the $5,000 fine payable to the court as unreasonable in the circumstances.

B. Pabst's Appeal

Reach of the Injunction

Pabst argues that the injunction could not bind him and that, accordingly, he could not be sanctioned for failure to follow it, because the Anti-Injunction Act, 28

U.S.C. § 2283, generally bars federal courts from entering orders which bar pending state court proceedings. *See, e.g., In re Dublin Sec., Inc. v. Hurd,* 133 F.3d 377, 380-81 (6th Cir.1997). While Pabst spends much time analyzing the Anti-Injunction Act and the district court cited authority analyzing whether and to what extent that Act limits a federal court's authority to protect the rights and obligations of the litigants before it, we find the Anti-Injunction Act inapposite. The district court did not purport to prohibit state court proceedings involving Flint and its employees and did not even prohibit counsel in such proceedings from eliciting, from Rose or otherwise, the very factual testimony she provided in this action. All the district court did was to prohibit the use of a deposition transcript which the court found was obtained unethically and in derogation of the protections afforded Rose under the law in the course of a litigation pending before her.

We find that this case is more accurately analyzed under Federal Rule of Civil Procedure 65(d) and those cases interpreting it and does not require parsing of the Anti-Injunction Act or the scope of any exceptions thereto.

Rule 65(d) provides that:

> every order granting an injunction . . . is binding only upon the parties to the action. their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them. . . .

Our deepest concern with the relief fashioned by the district court is that it enjoins non-parties to the litigation in *Banner.* We have often reiterated the principle that injunctive relief should be no broader than necessary to remedy the harm at issue. *See, e.g., United States v.*

Miami Univ., 294 F.3d, 797, 816 (6th Cir.2002). In *Blackard v. Memphis Area Medical Center for Women, Inc.*, 262 F.3d 568 (6th Cir.2001), we explained that Federal Rule 65(d) is based on the doctrine that "a decree of injunction not only binds the parties defendant but also those represented by them or subject to their control." *Id.* at 574 (quoting *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14, 65 S.Ct. 478, 89 L.Ed. 661 (1945)). To determine whether a person is "in active concert or participation with" an enjoined party, we look to the actual relationship between the two. *Id.* The third party is bound "if that party is identified with the named, enjoined party in interest, in 'privity' with it, represented by it or subject to its control." *Id.*

We hold that forbidding the use of the Rose deposition in the *Banner* case and forbidding its use by Pabst in other cases were both appropriate exercises of the district court's authority. We reach this conclusion because we find that Pabst was both in active concert and participation with Freifeld and the Law Firm, and had adequate notice of the details of the injunction to place him on notice of his obligations thereunder.

On this point, we note that Freifeld was the source of the copy of the deposition Pabst possessed and that Freifeld provided that transcript to Pabst for the precise purpose of enhancing Pabst's litigation posture against Flint, thereby encouraging Pabst's use of the very information Rose had disclosed to Freifeld in confidence. Pabst knew that Freifeld provided the deposition to him for the purpose of using the information provided by Rose against her employer. We find that these facts put Pabst in "privity" with Freifeld, at least as it relates to the subject-matter of the district court's injunction. *See Blackard*, 262

F.3d at 574 ("[t]o determine whether a person is one who acts in concert . . . with the enjoined party, the court must look to the actual relationship between the person enjoined and the person thought to be bound by the injunction"); *Black's Law Dictionary* 1079 (5th ed.1979) (the "concept of 'privity' pertains to the relationship between a party to a suit and a person who was not a party, but whose interest in the action was such that he will be bound by the final judgment as if he were a party"). Thus, while we agree that the district court's order may have been overbroad *as against the world in general,* we do not find it to have been overbroad as to Pabst.

Contempt Orders and Sanctions Against Pabst

We stated in *Blackard* that parties bound on its face by an injunction must follow it when it is in effect, even if it is later found erroneous. It is completely unacceptable for an attorney to defy an order of a federal court flagrantly and purposefully, even if the decision to do so is premised on a good-faith disagreement over the scope or validity of that order. *See N. Am. Coal Corp. v. Local Union 2262, United Mine Workers of Am.,* 497 F.2d 459, 465 (6th Cir.1974) ("[o]f course, even if the district court's injunction was invalid for the reasons we have outlined, it is settled law that it still must be obeyed until and unless it is overturned on appeal."). Pabst openly and admittedly chose to challenge the district court's order by disobeying it. Pabst did *not* file for modification of the order until after he was found in contempt and he did not await ruling from this Court vacating that order before he repeated his contemptuous conduct. With more civilized means of challenging a court order available, Pabst simply chose a course of flagrant defiance. Such defiance runs

counter to acceptable attorney conduct and the efficient administration of justice. The two findings that Pabst was in contempt were not an abuse of discretion, and we uphold them with an observation that such conduct is below that expected of an attorney admitted to practice in our courts.

The district court imposed sanctions, payable to the clerk of court, after finding contempt. In *Downey v. Clauder,* 30 F.3d 681, 685 (6th Cir.1994), we recognized the power of federal courts to impose civil or criminal sanctions on an attorney, but the court must look to both the proceeding and the relief granted to determine whether a contempt order is civil or criminal in nature. *Id.* Civil contempt sanctions are intended "to enforce compliance with court orders and to compensate injured parties for losses sustained." *Id.* Sanctions imposed "to vindicate the authority of the court by punishing past acts of disobedience" are criminal in nature. *Id.* Thus, an "unconditionally payable fine" for a contempt finding is criminal in nature. *Id.*

Several requirements must be satisfied before such a criminal contempt sanction may be imposed. The law requires four things: a finding that the individual violated a district court order; a finding that he did so deliberately; a finding that he so acted beyond a reasonable doubt; and notice, pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure, that failure to comply with the court's orders could result in a criminal sanction and that the court was considering the imposition of such a sanction. *See Smothers,* 322 F.3d at 441-42 (listing the four conditions for imposition of a criminal contempt sanction.).

In *Downey,* 30 F.3d at 686, we held that a conviction of criminal contempt without proper notice does not comport

with the strictures of Rule 42(b). Here, the district court did not initially give Pabst notice that he would be subject to criminal sanctions. The original notice for a hearing ordered Pabst to appear, but did not charge him with criminal contempt, nor even suggest he may be subject to punitive criminal sanctions for prior use of the Rose deposition. We conclude, accordingly, that the district court did not follow Rule 42(b) with respect to the first $1,000 contempt sanction imposed upon him. We, therefore, **REVERSE** the February, 2001, order imposing the $1,000 sanction (Appeal No. 01-1401), and **REMAND** for the district court to reconsider that sanction in accordance with this opinion.[5]

We find, however, that Pabst was *fully* on notice as of the January, 2002, sanctions order that his conduct would subject him to a finding of contempt and that a call to appear before the court in connection with that conduct would, in fact, be for the *precise* purpose of determining the propriety of such an award. The first hearing and first sanction, accompanied by the district court's explanation of her rationale, therefore, unequivocally put Pabst on notice that continued violations of the injunction order would neither be tolerated nor forgiven. We therefore **AFFIRM** the sanctions order that is the subject of the appeal in Case 02-1297.

Recusal of Judge Roberts

On appeal, Pabst requests that we find that Judge Roberts should have recused herself and that we remand

[5] On this point, we reiterate that the first three prerequisites to the imposition of a contempt sanction were clearly satisfied.

with direction to assign a different judge. We review such decisions for abuse of discretion. *Union Planters Bank v. L & J Dev. Co.,* 115 F.3d 378, 382 (6th Cir.1997). Under 28 U.S.C. § 455(a), recusal is warranted where "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Union Planters Bank,* 115 F.3d. at 383 (quoting *United States v. Dandy,* 998 F.2d 1344, 1349 (6th Cir.1993), *cert. denied,* 510 U.S. 1163, 114 S.Ct. 1188, 127 L.Ed.2d 538 (1994)). We have found no grounds for recusal.

Sanctions on Appeal

Flint and Rose move for sanctions in this appeal to punish Pabst for items in his brief they believe are frivolous. While the brief in question neither reflects exemplary legal writing nor, candidly, sufficient respect for the federal courts, it does not require further proceedings before us or additional sanctions. Thus, we **DENY** the motion.

III. CONCLUSION

In Freifeld and the Law Firm's appeal (Case No. 01-1118), we **AFFIRM** the district court's finding that Freifeld breached ethical rules, and hold that it did not err in reviewing the magistrate judge's order. We also **AFFIRM** the imposition of the injunction as it applies to use of the deposition by Freifeld and the Law Firm. We **AFFIRM** the judgment imposing sanctions generally, and the sanctions order imposing a total of $20,000 in attorneys' fees specifically, but **REVERSE** the $5,000 fine payable to the court.

In Pabst's appeals, we **AFFIRM** the injunction to the extent it forbids **Pabst** from using the Rose deposition, and **AFFIRM IN-PART** the finding of contempt against Pabst (Case No. 01-1297), and **REVERSE IN-PART** the imposition of sanctions against Pabst (Case No. 01-1401). We **REMAND** for further proceedings, as appropriate.[6]

[6] We do not *direct* the district court to conduct further proceedings; we merely find that further proceedings in Case No. 01-1401 may be appropriate. The district court is free to assess whether such proceedings are necessary in light of our other findings.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELIZABETH BANNER,

Plaintiff(s),

v.

CASE NUMBER: 99-74600

CITY OF FLINT and CARL HAMILTON,

HONORABLE VICTORIA A. ROBERTS

Defendant(s). /

ORDER HOLDING TOM R. PABST IN CONTEMPT DENYING PABST'S MOTION FOR DISQUALIFICATION AND DENYING PABST'S MOTION FOR SANCTIONS

(Filed Feb. 23, 2001)

I. Introduction

Pending before the Court is Defendants' and Intervenor Vickie Rose's Emergency Motion to Hold Tom R. Pabst in Contempt for Violating This Court's December 18, 2000 Opinion and Order. In addition to responding to that Motion, Pabst has moved to disqualify this Judge and for sanctions against Defendants' counsel. For the reasons that follow, the Court with [sic] grant in part and deny in part Defendants and Rose's Motion to hold Pabst in contempt and will deny Pabst's Motions.

II. Background

Rose is the Employee Health Clinic Coordinator for Fling. She met with Plaintiff's attorney, Michael Freifeld,

on what he recalls to be February 4, 2000 to determine whether Rose had a viable lawsuit arising out of her employment. Toward that end, Rose shared information with Freifeld regarding her then supervisor, Tony Morolla, that was relevant to Plaintiff's lawsuit against Defendants for reverse discrimination.

Subsequently, Freifeld noticed up Rose's deposition, which she appeared for on March 7, 2000. During the deposition, Freifeld's questions mirrored the discussion Rose had had with him during their consultation. Thereafter, on June 27, 2000, Defendants and Rose filed their Motion for Protective Order to Strike Ms. Rose's Deposition Testimony and to Disqualify the Law Office of Glen N. Lenhoff. They argued that Freifeld had violated Rose's attorney-client privilege and that she did not waive her privilege by answering Freifeld's deposition questions. In a December 18th 2000 Opinion and Order Setting Aside in Part The August 3, 2000 Order of Magistrate Judge Thomas A. Carlson, this Court agreed and found that Freifeld's actions violated MRPC 1.6. So finding, the Court struck Rose's deposition, sanctioned Freifeld and his law firm and enjoined their use of the deposition, and enjoined "the use of the Rose's deposition in any other proceedings by any attorney." (12/18/00 Order at 22).

During the November 3, 2000 evidentiary hearing regarding Defendants' and Rose's Motion to Disqualify the Law Office of Glen N. Lenhoff, Freifeld acknowledged that he had provided attorney Tom Pabst with a copy of Rose's deposition (Tr. At 80). Accordingly, defense counsel supplied Pabst with a copy of this Court's December 18 Opinion. Pabst responded by letter on December 27, 2000, stating that he questioned the finality and binding effect of this Court's Opinion. In particular, Pabst contends that

the state court is not bound by this Court's Order. He has, therefore, filed Motions for Evidentiary Hearings in two Genesee County Circuit Court cases, *Wooster v. City of Flint*, 99-66002 and *Doll v. City of Flint*, 00-67045. Pabst's Motions seek to compel Flint to produce "Rose for deposition to testify fully and truthfully, as she did in the *Elizabeth Banner*, case, that Defendant has a **POLICY** of favoritism towards black employees at the expense of white employees." (DFT's Ex. I and Ex. J). To support his Motions, Pabst attached complete copies of Rose's depositions to his filings.

Defendants' and Rose's Motion to Hold Pabst in Contempt followed. The Court will grant that motion as well as Defendants' and Rose's request to sanction Pabst. In all other respects, Defendants' and Rose's motion will be denied.

III. Analysis

A. Pabst's Motion to Disqualify this Judge

As an initial matter, the Court will deny Pabst's Motion to Disqualify this Judge. Pabst's Motion to Disqualify is based upon an allegedly improper *ex parte* communication between this Judge and defense counsel and the alleged hostility this Judge showed toward Plaintiff's counsel. In other words, Pabst is not arguing that this Court is biased against him; rather, he is relying solely upon this Judge's alleged bias against Plaintiff's counsel. And to support his claims, Pabst relies primarily upon an Affidavit of Glen N. Lenhoff.

Lenhoff's charges of bias on the part of this Judge, and Pabst's reliance upon those charges to file his Motion

to Disqualify, are untimely because they are brought after this Court's adverse ruling against the Lenhoff's law firm. Such was the holding of *Rabushka ex rel. U.S. v. Crane Co.*, 122 F.3d 559, 566 (8th Cir. 1997).

> [B]ecause [a motion for recusal] was not filed until after the district court had granted summary judgment to Crane [the opposing party] on the merits of the case, the motion was untimely. *See In re KPERS*, 85 F.3d [1353, 1360 (8th Cir. 1996)] (recusal motion untimely and interposed for suspect tactical reasons, 'can and should' be denied on that basis alone); *see also Neal v. Wilson*, 112 F.3d 351, 357 n. 6 (8th Cir. 1997) (disapproving of tactic of waiting until after district court issued unfavorable ruling before moving for recusal).

Also see In re City of Detroit, 828 F.2d 1160, 1167 (6th Cir. 1987) (holding that 28 U.S.C. § 455 implicitly requires that disqualification motions be made timely).

Further, Lenhoff's perception that this Judge was hostile toward him and Freifeld is an insufficient basis for disqualification under § 455(a). Section 455(a) provides, "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Disapproving expressions by a judge are insufficient to establish partiality. "*Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display." *Liteky v. U.S.*, 510 U.S. 540, 555-556 (1994) (emphasis in original). Nor are judicial remarks of even the hostile variety. *Id.* at

555. Likewise, Pabst's argument that this Court's December 18, 2000 Opinion evidences hostility toward Plaintiff's counsel is unavailing. "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Id.*

Moreover, this Judge's alleged bias against Plaintiff's counsel is insufficient to support a Motion for Disqualification. "As a general rule, bias against the party must be shown. . . ." *Panzardi-Alvarez v. U.S.*, 879 F.2d 975, 984 (1st Cir. 1989).

Further, The Court finds that there was nothing inappropriate in its communication with defense counsel on the day that the magnitude of the problem surrounding the Vicki Rose deposition was crystallized. Counsel for the City of Flint appeared for a status conference on another discrimination case filed against it (the *Gale* case), by the same attorneys who represented Elizabeth Banner, the case in which the Rose deposition was taken. While counsel indicated that a potential settlement in the *Banner* case might negate the need for a ruling on a pending summary judgment motion, it was also indicated that objections filed to the magistrate judge's ruling on the property of the Rose deposition, and whether any ethical violations occurred, was still concernable. It was also indicated during the status conference on the *Gale* case, that the same issue might arise in the *Gale* case. Indeed, shortly after the status conference in the *Gale* case was held, Defendants filed a motion for a protective order against Plaintiff's counsel, the Law Office of Glen Lenhoff, and including Mr. Freifeld, citing counsel's alleged inappropriate contacts with supervisory/managerial employees of the City of Flint, including Vicki Rose.

The Court believed it appropriate, since a monetary settlement in the *Banner* case would not moot its inherent power to consider potential unethical conduct which could permeate other litigation, to consider some of the concerns addressed in the objections filed in the *Banner* case which defense counsel believed would also be injected into the *Gale* litigation, outside of the presence of counsel for the Plaintiff. As this Court stated in its original Order, regardless of the wishes of the parties litigating the *Banner* case, this Court has an independent interest and the inherent authority to enforce the rules of professional conduct. *Zachair, Ltd. v. Driggs*, 965 F.Supp. 741, 749 (D.Md. 1997).

Accordingly, the Court will deny Pabst's Motion to Disqualify.

B. Binding Effect of December 18, 2000 Order

Much of Pabst's response to the instant Motion challenges this Court's authority to enjoin any attorney from using the Rose deposition in any proceeding. Notwithstanding Pabst's doubts about the merits of this Court's order, it is binding upon him and other attorneys. The Supreme Court has recognized "the established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 386 (1980). *Accord, NAACP, Jefferson County Branch v. Brock*, 619 F. Supp. 846, 849 (D.D.C. 1985) ("It is an established principle of law that once a court issues an injunction, those

persons who are subject to it are to obey the terms of that order as long as it remains in effect.").

Hence, until and unless this Court's December 18, 2000 injunction is overruled by an appellate Court, Pabst is unquestionably bound by it.

C. This Court's Ability to Bind Non-Parties

Furthermore, this Court's injunction of the use of the Rose deposition by non-parties was proper because it was necessary in order to effectuate its judgment. This case is akin to *U.S. v. Hall*, 472 F.2d 261 (5th Cir. 1972). In *Hall*, the trial court had entered a judgment in the case of *Mims v. Duval County School Board* that required the school board to implement a desegregation plan. As a result of the disruption of the plan by adult outsiders, the school board superintendent petitioned the trial court for injunctive relief. The trial court granted the petition, entering an order that enjoined certain activity on the part of the students "and other persons acting independently or in concert with them and having notice of this order. . . ." *Id.* at 263. Subsequently, Eric Hall, who had been served with the injunction, was arrested and then held in criminal contempt for being at a high school for the express purpose of violating the injunction.

On appeal, Hall's challenges to the injunction were akin to Pabst's.

> On this appeal Hall raises two related contentions. Both contentions depend on the fact that Hall was not a party to the *Mims* litigation and the fact that, in violating the court's order, he was apparently acting independently of the *Mims* parties. He first points to the common law

> rule that a nonparty who violates an injunction solely in pursuit of his own interests cannot be held in contempt. Not having been before the court as a party or as the surrogate of a party, he argues that in accordance with this common law rule he was not bound by the court's order. Second, he contends that Rule 65(d) of the Federal Rules of Civil Procedure prevents the court's order from binding him, since Rule 65(d) limits the binding effect of injunctive orders to 'parties to the action, their officers, agents, servants, employees, and attorneys, and . . . those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.'

Id. at 264.

In rejecting Hall's challenges, the Court of Appeals first distinguished the case before it from those in which "the activities of third parties, however harmful they might have been to the plaintiffs' interests, would not have disturbed in any way the adjudication of rights and obligations as between the original plaintiffs and defendants." *Id.* at 265.[1]

> The activities of Hall, however, threatened both the plaintiffs' right and the defendant's duty as adjudicated in the *Mims* litigation. In *Mims* the plaintiffs were found to have a constitutional right to attend an integrated school. The defendant school board had a corresponding constitutional obligation to provide them with integrated

[1] The cases from which the *Hall* court distinguished itself were *Alemite Manufacturing Corp. v. Staff*, 42 F.2d 832 (2nd Cir. 1930) and *Chase National Bank v. City of Norwalk*, 291 U.S. 431 (1934).

> schools and a right to be free from interference with the performance of that duty. Disruption of the orderly operation of the school system, in the form of a racial dispute, would thus negate the plaintiffs' constitutional right and the defendant's constitutional duty. In short, the activities of persons contributing to racial disorder at Ribault imperiled the court's fundamental power to make a binding adjudication between the parties properly before it.

Id., (citation omitted). Observing that the court's inherent power to render binding judgments over a case with which it has jurisdiction was at stake, the court concluded that "disruptive conduct would not only jeopardize the effect of the court's judgment already entered but would also undercut its power to enter binding desegregation orders in the future." *Id.*

The *Hall* court additionally likened its case to those involving in rem injunctions.

> Federal courts have issued injunctions binding on all persons, regardless of notice, who come into contact with property which is the subject of a judicial decree. A court entering a decree binding on a particular piece of property is necessarily faced with the danger that its judgment may be disrupted in the future by members of an undefinable class – those who may come into contact with the property. The in rem injunction protects the court's judgment.

Id. at 265-266, (citation omitted).

The Court of Appeals also rejected Hall's argument that Fed. R. Civ. P. 65(d) precluded the trial court from

enjoining non-parties that did not act is [sic] concert with the parties to the action.

> Literally read, Rule 65(d) would forbid the issuance of in rem injunctions. But courts have continued to issue in rem injunctions notwithstanding Rule 65(d), since they possessed the power to do so at common law and since Rule 65(d) was intended to embody rather than to limit their common law powers.
>
> Similarly, we conclude that Rule 65(d), as a codification rather than a limitation of courts' common-law powers, cannot be read to restrict the inherent power of a court to protect its ability to render a binding judgment.

Id. at 267.

In this case, Pabst argues that he cannot be bound by the December 18, 2000 Order because he was not acting in concert with Freifeld. However, as noted in *Hall*, Rule 65(d) does not limit this Court's inherent power to protect its ability to render binding judgments. And, had the Court failed to include an injunction against the use of the Rose deposition by any attorney in any proceeding, the effect of this Court's Order would have surely been jeopardized.

Like the parties in Hall, Pabst attempt to use the Rose deposition threatens both Rose's right and Freifeld and the Lenhoff firm's duty as adjudicated before this Court. In this case, the Court found that Rose had a right – an attorney-client privilege – and that Freifeld violated that privilege by cross-examining Rose without her clear consent. The Court remedied that ethical violation by, *inter alia,* striking the deposition and protecting Rose from

further harm as a result of Freifeld's ethical breach. Allowing other attorneys to take advantage of Freifeld's ethical violation would undermine Rose's privilege and would jeopardize the effect of the Court's Order.

Pabst insists that this Court's Order is an unwarranted interference in state court proceedings. However, the Order does not dictate the actions of any other court. Rather, the Order proscribes the use of the Rose deposition by any attorney. As with in rem actions, this Court was faced with the danger that its Order protecting Rose from further harm caused by Freifeld's ethical violation may be disrupted in the future by other attorneys who have or may come into possession of the deposition transcript. The injunction against the use of the deposition, like an in rem injunction, protects the Court's judgment.

The fact that the injunction against the use of the Rose deposition by non-parties was necessary in order to effectuate this Court's judgment that the deposition should be stripped of its evidentiary value, deems this case distinguishable from *Additive Controls & Measurement Systems, Inc. v. Flowdata, Inc.*, 96 F.3d 1390 (Fed.Cir. 1996). In that case, a company named Addictive Control & Measurement Systems ("Adcon") committed patent infringement and unfair competition with respect to its sale of a flowmeters. As a result, the trial court entered an injunction against Adcon. Subsequently, the president of Adcon, Galen Cotten, who was not named in the injunction, conspired with others to market other flowmeters based upon the same infringing design. The conspirators formed two companies, TruGear and Truflo, to manufacture and market the new devices, which were called TruGear meters. Two other companies, Nice Instrument

Services and Nice Instrument Sales, began to distribute the TruGear meters.

In response [sic] those developments, the trial court issued a new injunctive order that barred Cotton, his affiliates and those in active concert with him from making or selling the new flowmeters. Further, the new order prohibited TruGear, Truflo and the Nice companies from destroying or disposing of any TruGear flowmeters, and required the companies to provide an accounting of their TruGear meter sales.

On appeal, the Federal Circuit reversed, rejecting the claim that the All Writs Act[2] authorized the district court to extend its injunction to non-parties. Citing *Hall* as an example, the *Additive Controls* court noted that the All Writs Act authorizes courts to issue directives to non-parties "'as necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in the exercise of jurisdiction otherwise obtained.'" *Additive Controls* at 1396, *citing U.S. v. New York Tel. Co.*, 434 U.S. 159, 172 (1977). However, the Act "does not authorize [courts] to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Id.* at 1396-1397, (citation and quotation marks omitted). The court found that principle to apply to the case before it:

---

[2] The All Writs Act, 28 U.S.C. § 1651(a), states, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

> Although an injunctive order prohibiting non-parties from disposing of TruGear meters may be more efficient than a separate lawsuit against those parties, the All Writs Act does not authorize that kind of adjudicative shortcut. With regard to their independent activities (i.e., activities independent of Adcon or Cotton), the corporate appellants are entitled to contest their liability and the appropriateness of equitable relief in a lawsuit in which they are named as parties.

Id. at 1397.

Additive Controls is inapposite to this case. This Court's injunction is not an effort to conveniently dispose of any other attorney's ability to contest liability for his or her independent activities; no other attorney's independent activities are relevant to the injunction. The Court's prohibition against the use of the Rose deposition is based upon the fact that that deposition is tainted, being the product of an ethical violation on the part of Freifeld. Like an in rem injunction, this Court's Order proscribes the use of the Rose deposition by any attorney that has or may come in contact with it, without regard to any liability on the part of such an attorney.

Pabst reliance upon *McDowell v. Calderon*, 173 F.3d 1186 (9th Cir. 1999), is likewise unavailing. That case involved a petition for a writ of habeas corpus by a state prisoner who argued that his Sixth Amendment right to effective assistance of counsel had been violated. After ordering an evidentiary hearing, the trial court ruled that the petitioner's claim constituted a waiver of his attorney-client privilege. Hence, his lawyers were allowed to examine certain documents in *McDowell*'s trial counsel's file. A

protective order was also entered, which limited the use and access of the allegedly ineffective counsel's file. The file was only to be used by the California Attorney General's office for the purpose of the petition for writ of habeas corpus on the effective counsel claim.

After failing on the ineffective assistance claim but prevailing on a separate claim relating to the penalty phase of his trial, the petitioner was granted a writ of habeas corpus with respect to his death sentence. Additionally, the trial court reaffirmed its earlier, limiting protective order covering the attorney-client material previously disclosed to the Attorney General. At that time, the state filed a motion for reconsideration, arguing that the protective order improperly interfered with the petitioner's state court criminal retrial. The Court of Appeals agreed, stating, "Such an unprecedented order contravenes basic principles of comity and federalism." *Id.* at 1191.

Pabst's reliance on *McDowell* is misplaced for two reasons. First, this Court has not interfered with any state proceedings; the Court has proscribed the use of a deposition that was noticed up and taken under the authority of the Federal Rules of Civil Procedure in a case before this Court. That the Rose deposition originated in a matter before this Court distinguishes this case from *McDowell*, where the court was reviewing a state criminal action and the effectiveness of counsel in a state court proceeding. The conduct under scrutiny in this case occurred in a matter before this Court. Consistent with its inherent authority to enforce the rules of professional conduct in action before it, *Zachair, Ltd. v. Driggs*, 965 F.Supp. 741, 749 (D.Md. 1997), the Court found that Rose's deposition was tainted by Freifeld's ethical violation. To protect that

judgment and to strip the deposition of any evidentiary value, the Court has enjoined any attorney from using the deposition in any proceeding. Thus, unlike in *McDowell*, this Court has protected its own authority to enter a binding order rather than interfered [sic] in a state court action.

The second and equally compelling reason why Pabst's reliance upon *McDowell* is misplaced is because the opinion he cites was withdrawn, 187 F.3d 1160 (9th Cir. 1999), and reheard en banc. Unlike the opinion upon which Pabst relies, the opinion resulting from the Ninth Circuit's en banc review resulted in an affirmation of the trial court's protective order. Upon rehearing, the court noted that the appeal was of the trial court's denial of a motion for reconsideration. Consequently, the issue was whether the trial court had committed clear error in entering its protective order. The court concluded,

> The warden contends that, because raising ineffective assistance of counsel claims in a habeas petition waives the attorney-client privilege, the district court erred in prohibiting the Attorney General from disclosing the documents discovered from McDowell's trial counsel's file to 'prosecutorial personnel or agencies' for use in connection with McDowell's penalty phase retrial. It is debatable whether the district court can so limit the Attorney General's use of the documents from McDowell's trial counsel's file. The question being a debatable one, the district court did not commit clear error when it limited access to the file pursuant to the terms of the protective order. District courts have very broad discretion in fashioning discovery orders under Fed.R.Civ.P. 26(c), and the protective order did not fall clearly outside the bounds of that authority.

> The district court therefore did not abuse its discretion in denying reconsideration.

McDowell v. Calderon, 197 F.3d 1253, 1255-1256 (9th Cir. 1999).[3]

Thus, even in *McDowell*, where the protective order was clearly aimed at proscribing the disclosure and use of evidence in a state court proceeding, the Ninth Circuit did not find the trial court to have committed clear error.

D. The Injunction is Reasonably Specific

Lastly, the Court rejects Pabst's argument that the injunction does not comport with Rule 65(d) because it is too vague. "The drafting standard established by Rule 65(d) is that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed." *Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1531 (11th Cir. 1996). Injunctions are not set aside "under Rule 65(d) unless they are so vague that they have no reasonably specific meaning." *U.S. v. V-1 Oil Co.*, 63 F.3d 909, 913 (9th Cir. 1995). Further, the requirement of specificity does not demand unnecessary wordiness.

> The operative words in the preliminary injunction – 'any colorable imitation' of a particular

---

[3] In a January 29, 2001 hearing before Genesee County Circuit Court Judge Richard B. Yuille, Pabst represented that the earlier opinion in *McDowell* had been reinstated and is valid law again (Tr. at 6). That representation is not true. The last published filing in the *McDowell* case is the Supreme Court's denial of certiorari of the Ninth Circuit's later opinion affirming the trial court's protective order. *Calderon v. McDowell*, ___ U.S. ___, 120 S.Ct. 1708 (2000).

> logo – are words of legal art. Euroquilt does not propose a formulation that would have given it better notice. 'Colorable imitation' leaves a lot to the imagination, but Rule 65(d) does not require a torrent of words when more words would not produce more enlightenment about what is forbidden. When the difficulty stems from the inability of words to describe the variousness of experience, the court may prefer brief imprecise standards to prolix imprecise standards.

Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1432 (7th Cir. 1985).

Pabst argues that the injunction against "the use of Rose's deposition in any proceeding by any attorney" is too vague. His argument notwithstanding, the Court's injunction is similar to, and no more vague than, that in *Allard Enterprises, Inc. v. Advanced Programming Resources, Inc.*, 146 F.3d 350 (6th Cir. 1998). The injunction in that case provided "that 'plaintiffs are permanently enjoined from continuing to use the mark 'APR' or the mark 'APR of Ohio' in connection with the business of placing temporary or contract computer-oriented personnel with employers.'" *Id.* at 360. The Sixth Circuit found that language sufficient. "This language clearly forbids plaintiffs from any use of these marks and provides adequate notice of the proscribed conduct." *Id.*

As an attorney at law, Pabst surely knows the specific manners in which depositions are used in legal proceedings, he knows the various types of legal proceedings and he knows how to identify an attorney. The Court's brief description is sufficient to inform an ordinary attorney exactly what conduct is proscribed. The fact that Pabst is able to come up with far-fetched examples of how the

injunction may be read, e.g., a Japanese attorney using the Rose deposition in a Japanese court, does not negate the reasonable specificity of the order.

Further, Pabst undoubtedly knew that his action of attaching full copies of the Rose deposition to the state court filings contravened this Court's Order. During a January 29, 2001 hearing in front of Judge Richard B. Yiuille [sic] of the Genesee County Circuit Court, Pabst boasted, "I'm not troubled with attaching a copy of the transcript to a motion. I mean, to me that's how I challenge the federal court's order." (1/29/01 Tr. at 8). In light of his admission that his actions were to challenge this Court's Order, Pabst representation that he does not understand the meaning of the Order cannot be taken seriously.

E. Relief Requested

By filing Rose's deposition in the Genesee County Circuit Court, Pabst has violated the portion this Court's Order that "**ENJOINS** the use of the Rose's deposition in any other proceedings by any attorney." For that, Pabst will be sanctioned. Also, implicit in this portion of the Court's earlier Order, prohibiting any attorney from using the Rose deposition in other proceedings, is a prohibition which would extend to Mr. Pabst, barring him from sharing the Rose deposition with attorneys whom he knows will use the deposition in other legal proceedings.

However, the Court will not extend its injunction to preclude Pabst from deposing or cross-examining Rose on any matters that were the subject of her March 7, 2000 deposition. In this Court's December 18, 2000 Order, Plaintiff's counsel was enjoined from disclosing the contents

of the deposition to anyone else and from deposing or cross-examining Rose on the subject matter of her March 7, 2000 deposition. However, that portion of the injunction was not extended to "any attorney."

In order for this Court to hold Pabst bound by the portions of the Order specifically pertaining to Plaintiff's counsel, he would have [sic] be "in active concert or participation with" them. Rule 65(d). "The 'active concert or participation' clause is designed to prevent . . . the addressee of an injunction, eager to avoid its obligations, persuad[ing] a friendly third party to take steps that frustrate the injunction's effectiveness." *Lindland v. U.S. Wrestling Ass'n, Inc.*, 227 F.3d 1000 (7th Cir. 2000).

In this case, Pabst's questioning of Rose on the subject matter of her earlier deposition would not aid Plaintiff's counsel in any effort to avoid their legal obligations under the injunction. Furthermore, the evidence in this case reveals that Freifeld gave Pabst a copy of the Rose deposition before this Court's injunction. As a result, his giving Pabst a copy the deposition cannot be viewed as an effort to thwart his legal obligation under the injunction. There is no evidence that Pabst has or is acting in active concert or participation with Plaintiff's counsel and, therefore, he is not bound by the portions of this Court's Order specifically pertaining to Plaintiff's Counsel.

Finally, the Court finds it unnecessary to enter an order enjoining Pabst from proceeding in state court to litigate the admissibility of the March 7, 2000 deposition of Rose, as the December 18, 2000 Order already prohibits attorneys, such as Pabst, from using that deposition in any proceeding.

F. Pabst's Motion for Sanctions

The Court will deny Pabst's Motion for Sanctions because it violations [sic] E.D. Mich. L.R. 7.1(c)(1)(A) in that the Motion is not supported by a brief. Further, Defendants' and Rose's Motion is not frivolous, and Pabst did not follow the 21 day safe harbor rule found under Fed.R. Civ. P. 11(1)(A). Finally, Pabst's Motion for Sanctions is itself frivolous and contemptuous by requesting, *inter alia*, that Defedants' counsel and Rose be made to "take legal and ethics classes so that they are properly educated about principles of federalism, comity, and ethics in the representation made to judges." (Mot. For Sanctions at ¶ 2).

IV. Conclusion

Pabst is bound by the Court's injunction even if he had proper objections and, in any event, his objections are without merit. He has challenged this Court's authority to enjoin his use of the deposition by filing the Rose deposition in Genesee County Circuit Court and, as a result, he will be sanctioned.

THE COURT HEREBY GRANTS IN PART AND DENIES IN PART Defendants and Rose's Motion to Hold Tom Pabst in Contempt **[document 87-1]**; **SANCTIONS** Tom Pabst in the amount of One Thousand Dollars ($1,000) payable within 10 days of the date of this Order to the Clerk of the Court; **DENIES** Pabst's Motion for Sanctions **[document 92-2]**.

/s/ Victoria A. Roberts
VICTORIA A. ROBERTS
UNITED STATES
DISTRICT JUDGE

Dated: FEB 23 2001

STATE OF MICHIGAN

IN THE SEVENTH CIRCUIT COURT
(COUNTY OF GENESEE)

GREG DOLL,

Plaintiff

-vs- Case No. 99-5195-FC

THE CITY OF FLINT,
a Municipal Corporation, et al

Defendant

_____/

RECORD RE: VICKIE ROSE DEPOSITION/FEDERAL COURT INJUNCTION REMAND ON DEFENSE EXPERT WITNESS

BEFORE THE HONORABLE
GEOFFREY L. NEITHERCUT, CIRCUIT JUDGE

Flint, Michigan – Monday, January 29, 2001

APPEARANCES:

For the Plaintiff: MR. THOMAS R. PABST (P27872)
Attorney at Law
2503 S. Linden Road
Flint, MI 48532
(810) 732-6792

For the Defendant: MR. BRIAN A. KREUCHER (P43723)
Attorney at Law
440 East Congress, 5th Floor
Detroit, MI 48226-2917
(313) 965-7610

RECORDED BY: Via Video Camera

TRANSCRIBED BY: Janet Stepulkoski, CER #4731
Official Court Reporter
(810) 257-3264

* * *

[27] THE COURT: Correct.

MR. PABST: Thanks, Judge.

MR. KREUCHER: Oh, I'm sorry, Judge. One other thing – Mr. Pabst – the issue of the filing of Ms. Rose's deposition transcript. Can I ask that that be sealed, or is there some process to do that, until the federal court rules? It's now a matter of public record, which is in direct violation of the Court's order in federal court. That really concerns me. It's been filed as an attachment to this motion. It's been filed down in the clerk's office. Can we seal that?

MR. PABST: That's his interpretation of the order. I don't think it's violative of any order.

THE COURT: Yeah, but it's a good idea to seal it while we – while we wait on this. I think that's a good idea.

MR. KREUCHER: Is there any process I need to take or – to seal it – or does it just happen?

(Court confers with clerk)

THE COURT: Give us an order.

MR. KREUCHER: Okay. Thank you, Your Honor.

(At 10:56 a.m., proceedings conclude)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

DAVE WOOSTER,

Plaintiff,

vs.

CITY OF FLINT, a municipal/ governmental entity,

Defendant.

Case No. 99-66002-CL

Judge Richard B. Yuille

TOM R. PABST (P27872)
Attorney for Dave Wooster
2503 S. Linden Road
Flint, MI 48532
(810) 732-6792

KELLER, THOMA, SCHWARZE, SCHWARZE, DuBAY & KATZ, P.C.
By: Terrence J. Miglio (P30541)
Karin M. Young (P55808)
Attorneys for City of Flint
440 East Congress, 5th Floor
Detroit, MI 48226
(313) 965-7610

ORDER

At a session of said Court in the County of Genesee, State of Michigan, City of Flint, held on _____

PRESENT: HON. _____
Circuit Court Judge

The Court, having reviewed Plaintiff's Motion for evidentiary hearing filed on or about January 18, 2001; Defendants' Response to Plaintiff's Motion for an Evidentiary Hearing and Request for Sanctions; and having heard oral argument on January 29, 2001; for the reasons stated on the record.

IT IS HEREBY ORDERED that the Court will adjourn Plaintiff's Motion until Judge Victoria Roberts of the United States District Court, Eastern District of Michigan, Southern Division rules upon Defendants' and Intervenor, Vickie Rose's, Emergency Motion to Hold Tom R. Pabst in Contempt for Violating This Court's December 18, 2000, Opinion and Order and Motion for Expedited Hearing.

IT IS FURTHER ORDERED that the Court record containing the March 7, 2000, deposition transcript of Vickie Rose, which Mr. Pabst attached as an exhibit to Plaintiff's Motion, shall be sealed until further notice.

IT IS SO ORDERED.

/s/ RICHARD B. YUILLE P-22684
Circuit Court Judge
2/21/2001

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF GENESEE

GREG DOLL,

Plaintiff,

v

CITY OF FLINT,
a municipal/governmental
entity,

Defendant.

CASE NO: 00-67045-CL

JUDGE
GEOFFREY L. NEITHERCUT

TOM R. PABST
(P27872)
Representing Greg Doll
2503 S. Linden Road
Flint, MI 48532
(810) 732-6792

EDWARD L. PARKER
(P23220)
Co-Counsel for Defendant
City of Flint
1101 S. Saginaw St.,
Room 307
Flint, MI 48502-1757
(810) 766-7146

BRIAN A. KREUCHER
(P43723)
Attorney for Defendant
City of Flint
440 E. Congress, 5th Floor
Detroit, MI 48226-2917
(313) 965-7610

LOYST FLETCHER, JR.
(P29799)
Attorney for Karen Pugh
718 Beach Street
Flint, MI 48502-1105
(810) 238-4410

ANSWER OF GREG DOLL, PLAINTIFF, AND TOM R. PABST TO DEFENDANT CITY OF FLINT'S MOTION IN LIMINE TO PRECLUDE TESTIMONY REGARDING THE ALLEGED REMARK BY TONY MOROLLA THAT MS. ROSE SHOULD NOT "PISS OFF" AFRICAN-AMERICAN EMPLOYEES UNTIL AFTER THE ELECTION AND

RENEWED MOTION BY TOM R. PABST TO DETERMINE ADMISSIBILITY OF VICKIE ROSE SWORN DEPOSITION TESTIMONY IN THE *ELIZABETH BANNER* CASE, AND FOR THIS COURT TO DETERMINE WHETHER DEFENDANT AND/OR DEFENSE COUNSEL HAVE SUBORNED PERJURY

NOW COMES Tom R. Pabst, representing Greg Doll, Plaintiff, and answers Defendant City of Flint's aforesaid motion in limine, and renews their own previous aforesaid motion, as follows:

(1 & 2) Answering paragraphs 1 and 2, admitted.

(3) Answering paragraph 3, denied in the form and manner alleged because it is untrue. We state affirmatively that Caucasian Greg Doll was initially discriminated against because he would not cover up for an African-American employee caught stealing money from the City of Flint. It was all down hill after that. Mr. Doll has now been fired!! See Exhibit 1.

(4) Answering paragraph 4, denied in the argumentative form and manner alleged because it is untrue. We state affirmatively –

(a) That we seek to introduce the sworn deposition testimony of Vickie Rose in the *Elizabeth Banner* case which shows clearly –

(i) That Vickie Rose was *instructed* by Mayor Stanley, *via* human resource manager Tony Morolla, "not to piss off the blacks until after the election"; and

(ii) That the black employees of the City of Flint were allowed to violate the work

place rules without being punished, whereas white employees *were* punished;

(b) That I *previously* filed a motion to determine admissibility of the testimony of Vickie Rose in the *Elizabeth Banner* case, and also for this Court to investigate whether Defendant and defense counsel had suborned perjury in this case, and I hereby *RENEW* that motion and ask that this Court –

(i) Allow Tom R. Pabst to use the sworn deposition testimony of Vickie Rose in the *Elizabeth Banner* case;

(ii) To determine for itself whether Defendant and/or defense counsel suborned perjury in this case, and/or attempted to intimidate witness Vickie Rose from telling the truth.

(c) That federal Judge Robert *SPECIFICALLY SAID* in her written order that this Court is free to decide for itself that Vickie Rose's sworn testimony from the *Elizabeth Banner* case can be used in this case – and this Court *SHOULD* do so;

(d) That this is necessary because of Defendant and defense counsel's shameless intimidation and harassment of Vickie Rose at the March 15, 2001 deposition, a *complete* copy of which transcript I have attached to this answer and renewed motion as an exhibit.

Please note Judge Neithercut that Defendant and defense counsel acted the way they did at the March 15, 2001 deposition *AFTER* this Court specifically said I could

question Vickie Rose about the matters I attempted to question her about.

(5) Answering paragraph 5, we deny the allegations contained therein because they are untrue. Of course it is "prejudicial" to Defendant for the jury to know that Defendant makes decisions based on race, but the question is, is Defendant *UNFAIRLY* prejudiced? The answer to that question is "no", since Defendant has been caught red handed making employment practice decisions based on race!

(6) We further state affirmatively that –

(a) This Court should now "unseal" the sworn deposition testimony of Vickie Rose in the *Elizabeth Banner* case, and read it;

(b) Then this Court should read the *complete* deposition transcript of March 15, 2001; and

(c) Then read Defendant's motion and brief again, and decide for itself if someone is lying to this Court.

WHEREFORE, Tom R. Pabst respectfully requests –

(A) That this Honorable Court deny Defendant's motion in limine;

(B) That this Honorable Court rule that the sworn deposition testimony of Vickie Rose given in the *Elizabeth Banner* case is admissible and usable by Tom R. Pabst in this case;

(C) That this Honorable Court decide if Defendant and/or defense counsel have suborned perjury, and/or attempted to intimidate and harass a witness from telling the truth; and

(D) Have such other and further relief as is fair and just under our circumstances.

Respectfully submitted,

Dated: 8-8-01

/s/ Tom R. Pabst
TOM R. PABST (P27872)
Representing Greg Doll, Plaintiff